6-11-2014

State v. Ellis Respondent's Brief Dckt. 40898

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, vs. JERRY LEONARD ELLIS, II, Defendant-Appellant.	)	Nos. 40898, 40901 Kootenai Co. Case Nos. CR-2009-20230, CR-2006-34

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

RULES

STATEMENT OF THE CASE

Nature Of The Case

Jerry Leonard Ellis, II, appeals from the district court's denial of his motions to (1) continue his latest probation violation hearing in order to retain new counsel, and (2) continue the disposition phase of the hearing to allow him more time to prepare a defense and call witnesses on his behalf.

Statement Of The Facts And Course Of The Proceedings

In 2006, Ellis pled guilty to felony driving under the influence of alcohol pursuant to a plea agreement in which two misdemeanor charges were dismissed. (R., pp.70-72, 78-81.) The trial court sentenced Ellis to a three and one-half year indeterminate term, all suspended, and placed him on probation for that same period. (R., pp.85-95.) In November 2007, the state filed a Report of Probation Violation against Ellis alleging seven violations. (R., pp.115-117.) Seven additional allegations were later added to the list of probation violations. (R., pp.145-147, 162-163.) Ellis either admitted to violating, or was found to have violated, his probation in many ways: driving without privileges (twice), failing to attempt relapse prevention classes, staying at an unapproved house, testing positive for amphetamines, being at a residence where illegal substances were being used, making false statements to his probation officer, possessing/consuming alcohol, refusing to provide a urine sample for testing, and failure to report to probation and parole (twice). (R., pp.168-176.) The trial court revoked Ellis' probation, ordered his original sentence executed, and retained jurisdiction for 180 days. (R., pp.179-181.) After Ellis completed his rider, the court suspended his sentence and placed him on probation for two years. (R., pp.187-191.)

In August 2008, the state filed a second Report of Probation Violation (R., pp.200-202), which resulted in the trial court finding Ellis in violation of his probation by consuming alcohol, testing positive for methamphetamine, and failing to report to the probation office for new offender orientation (R., pp.240-241). The court continued disposition on the probation violations to see how Ellis would comply with probationary terms and conditions. (R., pp.243-248.)

The state filed a third Report of Probation Violation in September 2009, alleging (1) Ellis was recently arrested for driving under the influence and (2) he failed to pay his cost of supervision. (R., pp.253-255.) As a result of his arrest, the state charge Ellis with felony operating a motor vehicle while under the influence of alcohol in Kootenai County Case No. CRF09-20230. (R., pp.304-306.) Pursuant to a Rule 11 plea agreement, Ellis admitted the probation violation in his 2006 case and pled guilty to felony DUI in his 2009 case, with an agreed upon recommendation that he would be placed on a concurrent rider in both cases. (R. pp.311-317.) After sentencing Ellis to an underlying term of ten years with five years fixed in the 2009 case, the court suspended the sentence and placed Ellis on a concurrent rider in both cases. (R., pp.320-327.) At the end of Ellis' second rider, the court suspended both his 2006 and 2009 sentences and placed him on probation for three years. (R., pp.333-337, 342-346.)

The state filed a Report of Probation Violation in January 2011, applicable to both the 2006 and 2009 cases (the fourth re: the 2006 case). (R., pp.357-360.) Ellis admitted seven allegations: consuming alcohol, purchasing alcohol, associating with a probationer specifically precluded by his probation officer, failing to pay supervision

fees, failing to report for random drug testing, failing to report for aftercare, and failing to report to the to the Idaho Department of Correction for a visit. (R., pp.357-360, 393-394.) The court extended Ellis' probation in each case for an additional four years, and ordered Ellis to successfully complete the mental health drug court program. (R., pp.409-414.)

On November 11, 2011, Ellis was arrested for driving without privileges, which resulted in another Report of Probation Violation (the fifth re: the 2006 case). (R., pp.439-441.) Ellis admitted violating his two probations by being terminated from the Kootenai County Mental Health Court Program for non-compliance with rules, and for committing the crime of driving without privileges. (R., pp.439-440, 449.) The court revoked probation, ordered Ellis' sentences executed, and placed him on a rider -- his third in the 2006 case, and second in the 2009 case. (R., pp.453-455.) In May 2012, after Ellis completed his rider, the court suspended the underlying sentences in both cases, placed him on probation for seven years, and, as a condition of probation, ordered him to apply to mental health court. (R., pp.463-468.)

After the state filed another Report of Probation Violation (the sixth re: the 2006 case) in March 2013, he was found to have violated his probations again by being terminated from the Kootenai County Mental Health Court program for non-compliance with its rules, and for committing the crime of driving without privileges, as well as committing petit theft. (R., pp.503-506, 538-539.) The court revoked Ellis' probations and ordered his sentences executed. (R., pp.543-544.) Ellis filed a timely appeal in both cases, and this Court granted Ellis' motion to consolidate the cases on appeal. (R., pp.545-548; 5/21/13 Order Granting Motion to Consolidate.)

ISSUES

Ellis states the issues on appeal as:

1. Did the district court abuse its discretion when it denied Mr. Ellis' request for a continuance in order to retain private counsel?

2. Did the district court deny Mr. Ellis due process when it refused to continue the disposition portion of the probation revocation hearing, which was requested in order for Mr. Ellis to prepare a defense and call witnesses to testify on his behalf?

(Appellant's Brief, p.7.)

The state rephrases the issues as:

1. Has Ellis failed to show that the district court abused its discretion in denying his motion for a continuance to allow him time to retain new counsel?

2. Has Ellis failed to demonstrate that the district court abused its discretion by denying his motion to continue the dispositional phase of the probation violation hearing?

ARGUMENT

I.
Ellis Has Failed To Show That The District Court Abused Its Discretion In Denying His Motion For A Continuance To Allow Him Time To Retain New Counsel

A. Introduction

At his last probation violation hearing, when the district court asked Ellis whether he admitted or denied the allegations, Ellis requested a continuance to enable him more time to replace his appointed counsel with new retained counsel. (3/21/13 Tr., p.7, Ls.5-19.) Ellis said he had talked to an attorney (John Redal) who told him "to get a continuance today until [Redal] gets back on the 8th to represent [him] in this matter." (3/21/13 Tr., p.7, Ls.15-19.) The court denied Ellis' substitution request, explaining that Mr. Redal "is not here today[,]" and that Ellis has an attorney. (3/21/13 Tr., p.7, Ls.20-21.) At the end of the hearing, the court elaborated:

> Your claim that you wanted John Redal today was made nothing [sic] -- for no other reason than to create delay. That's my specific finding. Somebody has paid a lot of money for a variety of different attorneys over the last seven years to come into court and delay things for Jerry Ellis.

(3/21/13 Tr., p.49, Ls.12-17.)

On appeal, Ellis contends "the district court abused its discretion when it denied his request for a continuance in order to retain counsel . . . [and that] he was denied a right to retained counsel throughout his probation violation proceedings." (Appellant's Brief, p.8.) Ellis has failed to show error, much less any denial of a substantial right, in the district court's denial of his motion to continue the probation violation hearing to enable him to retain new counsel.

B. Standard Of Review

The decision whether to grant a continuance rests within the discretion of the trial judge. State v. Tapia, 127 Idaho 249, 255, 899 P.2d 959, 965 (1995); State v. Ransom, 124 Idaho 703, 706, 864 P.2d 149, 152 (1993); State v. Averett, 142 Idaho 879, 889, 136 P.3d 350, 360 (Ct. App. 2006). "Unless an appellant shows that his substantial rights have been prejudiced by reason of a denial of his motion for continuance, appellate courts can only conclude that there was no abuse of discretion." Id. (citing State v. Cagle, 126 Idaho 794, 797, 891 P.2d 1054, 1057 (Ct. App. 1995)).

C. Ellis Has Failed To Show That The District Court Abused Its Discretion In Denying His Motion For A Continuance

The Sixth Amendment's right to counsel encompasses two distinct rights: a right to adequate representation and a right to choose one's own counsel when counsel is privately retained. United States v. Gonzalez-Lopez, 548 U.S. 140 (2006); United States v. Rivera–Corona, 618 F.3d 976, 979 (9th Cir. 2010). The adequate representation right applies to all defendants and "focuses on the adversarial process, not on the accused's relationship with his lawyer as such." United States v. Cronic, 466 U.S. 648, 657 n. 21 (1984). A defendant who can hire his own attorney has an additional right, separate and distinct from the right to effective counsel – the right "to be represented by an attorney *of his choice.*" Rivera-Corona, 618 F.3d at 979 (citing Gonzalez-Lopez, 548 at 147-48) (emphasis in original); see also State v. Shackelford, 150 Idaho 355, 381, 247 P.3d 582, 608 (2010) ("The Sixth Amendment guarantees defendants in criminal cases the right to adequate representation and to a qualified right to choice of counsel, but those who do not have the means to hire their own lawyers

have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts.") (internal citation omitted).

However, the right to retain one's own counsel is not absolute. The Supreme Court has "recognized a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness and against the demands of its calendar." Gonzalez-Lopez, 548 U.S. at 152 (citing Wheat v. United States, 486 U.S. 153, 159-60 (1988), and Morris v. Slappy, 461 U.S. 1, 11-12 (1983)). For this reason, trial courts retain discretion to "make scheduling and other decisions that effectively exclude a defendant's first choice of counsel." Id. In general, a defendant who can afford to hire counsel may have the counsel of his choice unless "the substitution would cause significant delay or inefficiency." Rivera-Corona, 618 F.3d at 979.

Where a defendant seeks a continuance to retain new counsel, several factors are relevant: the timing of the motion; the requested length of delay, including whether the delay is an attempt to manipulate the proceedings; the number, if any, of similar continuances sought by the defendant; inconvenience to witnesses; any prejudice to the prosecution; whether an irreconcilable conflict exists between the accused and counsel; and the qualifications possessed by present counsel. State v. Cagle, 126 Idaho 794, 797, 891 P.2d 1054, 1057 (Ct. App. 1995); State v. Carman, 114 Idaho 791, 793, 760 P.2d 1207, 1209 (Ct. App. 1988). Application of these factors to this case demonstrates Ellis has failed to show error in the district court's denial of his request for a continuance so that he could hire new counsel.

The timing and circumstances of Ellis' motion supports the district court's denial of his request for new retained counsel and its conclusion that Ellis was purposely

attempting to delay the proceedings. At the start of the probation violation hearing, Ellis' counsel requested a continuance in order to obtain an updated mental health evaluation because Ellis said he felt overwhelmed and did not think his medications were working. (3/21/13 Tr., p.3, L.15 - p.5, L.19.) The court denied Ellis' motion, stating in part, "there has been a pattern of delay with Mr. Ellis every time there's been the prospect of prison, and I am not finding his complaints to be credible . . . ." (3/21/13 Tr., p.6, Ls.10-18.) The court noted that, in reviewing the weekly notes of Ellis' mental health court program since May 17, 2012, "[t]here has never been one time where there's been a complaint of not feeling appropriate from a mental health standpoint."[1] (3/21/13 Tr., p.5, L.25 - p.6, L.2.)

Undeterred by the district court's comments, Ellis again requested a continuance after the court asked him to either admit or deny the probation violation allegations -- he suddenly claimed he was not ready to proceed because he wanted to retain new counsel, who would be available no sooner than "the 8th" (presumably) of April, about 18 days later. (3/21/13 Tr., p.7, Ls.5-19.) The court denied Ellis' second attempt to continue the proceedings, and explained at the end of the hearing:

> You have shown an incredible ability to delay these proceedings every time you face prison, and I know I wasn't your judge back in 2006, but I look at what happened back in 2006. It took eleven months for you to enter a plea on felony DUI. Every time you've had a probation violation where prison is the recommendation you manage to draw it out into a six,

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[1] The district court similarly stated at the end of the probation violation hearing:

> I specifically find you not to be credible in those claims. You've never once in the three years that I've known you since coming into this program, not once have you claimed not to be stable on your mental health medications.

(3/21/13 Tr., p.48, Ls.2-6.)

> seven, eight-month ordeal before you even go on a rider, and you showed every ability to do that here again today.
>
> . . . Somebody has paid a lot of money for a variety of different attorneys over the last seven years to come into court and delay things for Jerry Ellis.

(3/21/13 Tr., p.48, L.13 - p.49, L.17.)

The district court previously explained that, after reading through Ellis' court files, it detected a "pattern of delay . . . every time there's been the prospect of prison[.]" (3/21/13 Tr., p.6, Ls.10-14.) Considering that history of delay, the court reasonably concluded that Ellis' motion to continue so he could retain new counsel, made immediately upon being asked to either admit or deny the allegations, was one more attempt to delay the "prospect of prison." (Id.) The court's finding that Ellis' motion to retain new counsel was done for the purpose of delaying the proceedings is borne out by the lack of any complaint by Ellis about his current counsel. The record does not indicate any "irreconcilable conflict" between Ellis and his attorney, and neither represented to the court that the lines of communication between them had broken down. Further, the court informed Ellis, "the best attorney you've ever had is seated to your left." (Trial Tr., p.49, Ls.8-12.)

Based on the above factors, Ellis has failed to show that any of his substantial rights have been prejudiced by the denial of his motion for a continuance to retain new counsel; therefore, this Court "can only conclude that there was no abuse of discretion." Averett, 142 Idaho at 889, 136 P.3d at 360 (citing Cagle, 126 Idaho at 797, 891 P.2d at 1057).

II.

Ellis Has Failed To Show That His Procedural Due Process Rights To Notice And An Opportunity To Be Heard Were Violated

A. Introduction

Ellis contends he was denied due process because he was not notified that the disposition hearing would follow the adjudicatory hearing on the probation violation allegations, and because the district court denied his motion to continue the disposition hearing to allow him to prepare his case and call witnesses to present live testimony. (Appellant's Brief, pp.11-17.)

At the outset of Ellis' dispositional hearing, his attorney asked for a continuance, explaining he was not ready to proceed because he wanted to call Ellis' mother and girlfriend as witnesses. (3/21/13 Tr., p.16, Ls.2-8.) The court asked Ellis' counsel for an offer of proof about what the two witnesses would testify to, and he explained:

> I think that having his mother . . ., I think I need her to testify about how well he's done and whether she believes that he would be a threat to the community because that's one of the issues -- that is the main issue that the Court has to look at at sentencing, so I do believe I need her to look at at [sic] sentencing, so I do believe I need her for some mitigation, anticipating what the State is going to be recommending.

(3/21/13 Tr., p.17, Ls.1-8.)

When the district court asked Ellis' counsel what Ellis' mother would specifically testify about in regard to Ellis not being a threat to the community, counsel elaborated:

> Well, Your Honor, I don't know. I'm assuming that she -- I'm not quite sure, to be honest with the Court. I think that she can testify that he has lived with her and, uh, has seen him in the community. I know there's all kinds of allegations that are, I guess for lack of a better term, hearsay allegations about him driving, when he's been driving whether he's been drinking alcohol, and I think that the person who is closest to him would be relevant to that discussion, and he also has a -- he's indicating to me, Your Honor, that he wants to call his sponsor.

(3/21/13 Tr., p.17, L.17 - p.18, L.2.)

The court asked for an offer of proof of what the sponsor would say, and Ellis' counsel answered, "I believe that he has been clean and working the steps." (3/21/13 Tr., p.18, Ls.3-6.) The district court accepted counsel's offer of proof as true, but denied Ellis' motion to continue the disposition hearing. (3/21/13 Tr., p.18, Ls.7-11.) After lengthy testimony by Ellis, the court revoked Ellis' probations and ordered his original sentences executed without modification. (3/21/13 Tr., p.45, Ls.8-18.)

On appeal, Ellis contends his due process rights to notice and an opportunity to be heard were violated because, he alleges, he did not receive adequate notice of the disposition hearing and the district court denied his motion to continue the hearing so his witnesses could testify. (Appellant's Brief, pp.11-17.) Ellis' "notice" argument fails because he received the notice he was entitled to receive for a probation violation hearing -- notice of the allegations. The court also gave Ellis the opportunity to call witnesses at the disposition hearing, and, because they were not present, by accepting as true counsel's offer of proof about their testimony. Even assuming Ellis was not given adequate notice of the dispositional phase of the probation violation hearing, he has failed to demonstrate that any substantial right has been prejudiced thereby.

B. Standard Of Review

The standard of appellate review applicable to constitutional issues such as claimed due process violations is one of deference to factual findings, unless they are clearly erroneous, but free review of whether constitutional requirements have been satisfied in light of the facts found. State v. Bromgard, 139 Idaho 375, 380, 79 P.3d

734, 739 (Ct. App. 2003); State v. Smith, 135 Idaho 712, 720, 23 P.3d 786, 794 (Ct. App. 2001).

Constitutional error may be deemed harmless. Arizona v. Fulminante, 499 U.S. 279, 306 (1991). Idaho Criminal Rule 52 provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." As the appellant, Ellis bears the burden of establishing that the district court's actions affected his substantial rights. State v. Whiteley, 124 Idaho 261, 269-70, 858 P.2d 800, 808-09 (Ct. App. 1993); State v. Browning, 121 Idaho 239, 245, 824 P.2d 170, 176 (Ct. App. 1992). "Absent a showing of prejudice, the error will be deemed harmless." Whiteley, 124 Idaho at 269, 858 P.2d at 808. The "mere possibility" of prejudice is insufficient to meet this burden. State v. McKinney, 107 Idaho 180, 185, 687 P.2d 570, 574 (1984).

C. Ellis Was Provided Procedural Due Process

"The right to procedural due process guaranteed under both the Idaho and United States Constitutions requires that a person involved in the judicial process be given meaningful notice and a meaningful opportunity to be heard." State v. Blair, 149 Idaho 720, 722, 239 P.3d 825, 827 (Ct. App. 2010). In the context of parole and probation violation hearings, the Idaho Supreme Court has set forth the due process requirements as follows:

> In *Morrissey* [*v. Brewer*, 408 U.S. 471 (1972)], the Supreme Court held that before the government could revoke a parolee's parole, due process requires the following:
>
> > (a) *written notice of the claimed violations of parole*; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer

> specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense. It is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial.
>
> 408 U.S. at 489 . . . .
>
> With regard to the revocation of probation, the Court subsequently held that "a probationer, like a parolee, is entitled to a preliminary and a final revocation hearing, under the conditions specified in *Morrissey*." *Gagnon v. Scarpelli*, 411 U.S. 778, 782 . . . (1973). Thus, the State "must provide the same process [found in *Morrissey*] when terminating a probationer from probation." [*State v.*] *Rogers*, 144 Idaho [738] at 742–43, 170 P.3d [881] at 885–86 [(2007)]. As a fundamental matter, this Court has affirmed the *Morrissey* and *Gagnon* holdings that "[p]robationers do not enjoy the full panoply of constitutional protections afforded criminal defendants." *State v. Rose*, 144 Idaho 762, 765, 171 P.3d 253, 256 (2007). Nevertheless, "a probationer has a protected liberty interest in continued probation, and is therefore entitled to due process before probation may be revoked" — thus, we look first to *Morrissey* and *Gagnon* for those minimum due process requirements. Id. at 766, 171 P.3d at 257.

State v. Scraggins, 153 Idaho 867, 292 P.3d 258 (2012) (emphasis added). Under Morrissey, Gagnon and Scraggins, the "notice" required for due process in probation revocation hearings is "written notice of the claimed violations of [probation]." Id. Ellis was provided such notice.

Although Ellis did not answer the district court's direct question of whether he had read the Report of Violation dated March 18, 2013 (3/21/13 Tr., p.3, Ls.10-13), it clearly appears he did.[2] At the outset of the probation violation hearing, Ellis stated that he

[2] At the beginning of the probation violation hearing, the district court asked Ellis, "Have you had a chance to read that document[,]" but Ellis' counsel interrupted before Ellis could answer, and asked the court to first consider a motion for an updated mental

understood the allegations against him (3/21/13 Tr., p.7, Ls.3-4), then demonstrated his familiarity with the allegations by admitting the second allegation and denying the third allegation -- without the court reciting what the allegations were (3/21/13 Tr., p.3, L.7 - p.8, L.13). The Report of Probation Violation, dated March 18, 2013, not only advised Ellis of the specific probation violation allegations, it also informed him that his probation officer was recommending "[his] probation be revoked and sentence imposed." (R., pp.505-506.) Inasmuch as Ellis was fully informed of the probation violation allegations and recommendations, he cannot show a due process violation based on lack of notice.

Nor did the district court deny Ellis a meaningful opportunity to be heard. At the beginning of the disposition phase of the probation violation hearing, Ellis' counsel asked the court for a continuance so he could have Ellis' mother and Ellis' girlfriend appear in court to testify.[3] (3/21/13 Tr., p.16, L.2 - p. 18, L.2.) The court showed it was willing to hear testimony presented by Ellis that very day when it asked, "[w]hat is the reason why those witnesses aren't here today?" (3/21/13 Tr., p.16, Ls.10-11.) When told that Ellis' witnesses were not present for the probation violation hearing, the court asked Ellis' counsel for an offer of proof of what their testimony would be. (3/21/13 Tr., p.16, Ls.12-18.) Ellis' counsel made an offer of proof of the witnesses' testimony, and the court accepted, as true, counsel's rendition of what their testimony would have

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health evaluation. (3/21/13 Tr., p.3, L.10 - p.4, L.3.) The court denied that motion, and again asked, "So back to my question to you, Mr. Ellis. Do you understand the three allegations that have been made against you?" (3/21/13 Tr., p.6, Ls.19-21.) Ellis said he did not feel well, and after the court explained that the question was a "yes" or "no" question, Ellis said, "I understand the allegations against me, Your Honor, but I'm not ready to proceed." (3/21/13 Tr., p.6, L.22 - p.7, L.4.)

[3] Ellis' counsel's offer of proof included what Ellis' mother and his sponsor would have testified to, but did not explain what his girlfriend's testimony would have been. (See 3/21/13 Tr., p.16, L.19 - p.18, L.6.)

been. (3/21/13 Tr., p.16, L.19 - p.18, L.11.) The offer of proof apparently provided the district court with the same information the potential witnesses' testimony would have given. On appeal, Ellis has not cited any anticipated testimony that was omitted from counsel's offer of proof. (See Appellant's Brief, pp.11-17.) In short, Ellis was given a meaningful opportunity to be heard, and took advantage of it by making an offer of proof of what his witnesses would have testified to, not leaving anything out. Ellis has failed to show that the court violated his due process right to be heard.

Even assuming, *arguendo*, the district court erred by not providing Ellis either adequate notice of the disposition hearing or a meaningful opportunity to be heard, he has failed to demonstrate such error prejudiced any of his substantial rights. State v. Murphy, 99 Idaho 511, 514, 584 P.2d 1236, 1239 (1978)) (a defendant claiming a due process violation must "affirmatively show actual prejudice and the effect of that prejudice upon his or her ability to present a defense"); State v. Dopp, 129 Idaho 597, 603-04, 930 P.2d 1039, 1045-46 (Ct. App. 1996) (rejecting Dopp's claim that he was prejudiced by the timing of the district court ruling on Dopp's motion in limine when Dopp failed to establish any unfair prejudice).

Given Ellis' failure to succeed on probation after three stints in the rider program and five probationary periods, having his mother testify that her son was not a threat to the community and was doing well on probation would not have swayed the district court to continue Ellis on probation or give him a lesser sentence. For the same reasons, testimony from Ellis' substance abuse program sponsor that Ellis "has been clean and been working the steps" (3/21/13 Tr., p.18, Ls.3-4) would not have been enough to make an impact on the court's sentencing determination. Ellis does not

explain what difference it would have made for his mother and sponsor to have testified in open court as opposed to having counsel present their testimony through an offer of proof. Moreover, as the district court concluded, Ellis squandered many opportunities to succeed on probation and showed he remained a risk to the public:

> First of all, this is a decision that is based entirely on public safety . . ., but that's the entire reason I'm sending you to prison. You drove. Judge Gibler told you when you received the benefit of another felony DUI in 2011 that was dismissed if you can get into this program, Judge Gibler told you that, "I don't have a lot of comfort that you won't get behind the wheel. This is a really tough decision for me. I'm not a hundred percent convinced this is the right decision to place you back on probation and have you do the mental health court." Judge Gibler went out on a huge limb to get you into this program.
>
> I went out even further the first time you messed up in the mental health court program and sent you on your third retained. You can do just fine on a retained, but what you can't do, what you've shown your inability to do is not get behind the wheel when you don't have the ability to do that, so it's really entirely about allegation number two which you admitted to that you committed the misdemeanor crime of driving without privileges, that's the reason you're going to prison. You, as [the prosecutor] pointed out, have I think it is nine prior DUIs that haven't been dismissed.

(3/21/13 Tr., p.46, L.21 - p.47, L.19.)

Given the district court's characterization of Ellis' risk to the community, neither the testimony of Ellis' mother or his sponsor would have resulted in a different sentence. For the above-stated reasons, Ellis has failed to demonstrate that a due process violation prejudiced any of his substantial rights. Murphy, 99 Idaho at 514, 584 P.2d at 1239.

CONCLUSION

The state respectfully requests this Court affirm the district court's order revoking Ellis' probation and executing his underlying sentences.

DATED this 11th day of June, 2014.

JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 11th day of June, 2014, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SHAWN F. WILKERSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

John C. McKinney
Deputy Attorney General

JCM/pm